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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

CHARLES DUARTE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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April 13, 1981

QUESTIONS PRESENTED

1. Whether petitioner was compelled to produce personal business records in violation of his fifth amendment privilege against self-incrimination.

2. Whether the required records doctrine of Shapiro v. United States 335 U.S. 1 (1948) is in agreement with the definitive interpretation of the fifth amendment privilege in Fisher v. United States, 425 U.S. 391 (1976).

3. Whether petitioner was deprived of due process of law when he was brought before the court soon after the death of his counsel and was ordered to produce self-incriminating testimonial documents to the Grand Jury, after a hearing where he was without counsel and was not advised that he could retain counsel.

4. Whether the petitioner was deprived of his right to counsel in the judicial proceeding compelling production for the Grand Jury of incriminating documents, despite his claim of privilege, where the Grand Jury proceedings closely related to a previously dismissed criminal complaint and search and seizure.

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CHARLES DUARTE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent,

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, Charles Duarte respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and appears in the appendix hereto, as do the judgment of

the United States District Court for the District of California and its order denying petitioner's motion to suppress.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 5, 1980. A timely petition for rehearing was denied. An extension of time to file this petition was granted until April 17, 1981. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law."

STATEMENT OF THE CASE

On January 9, 1979 a criminal complaint charged petitioner with attempted bribery of a FBI agent. His premises were searched but the seized documents were returned to petitioner and the complaint was dismissed February 27, 1979.

By a subpena dated April 11, 1979 petitioner was commanded as custodian of records of his business to bring certain documents before the Grand Jury. Appendix, 1. Petitioner's counsel and the U. S. Attorney's office exchanged memoranda of the applicable law. On July 18, 1979 petitioner appeared before the Grand Jury, claimed the privilege against self-incrimination and was excused. In July 1979, his counsel died. On August 22, 1979 the government filed a motion

to compel petitioner to produce the subpenaed documents.

At the hearing September 10, 1979 petitioner appeared without counsel and was introduced as the custodian of records. He was presented to the court as a mere custodian of records, although the government has subsequently admitted he was a target defendant. The five-minute hearing consisted primarily of a colloquy between the court and the prosecutor as to the holding of of Fisher v. United States. Having been ordered to produce the documents, and threatened with contempt, petitioner turned over the documents without further protest.

On December 10, 1979 petitioner was indicted on the same bribery charge as in the earlier complaint, and an

additional twenty counts based on ten of the subpenaed Medi-Cal billings. Petitioner brought a pretrial motion to surpress the documents which he had earlier produced. The motion was denied on the basis of the required records doctrine. Appendix, 2.

The Medi-Cal billings turned over by petitioner included Exhibits 1 through 10 introduced at his trial. He was convicted of multiple violations of 18 U.S.C. §287 and 1341 on the basis that he answered "no" to a printed question on the billing forms "was laboratory work performed outside your office?" He was sentenced to probation and a fine of $10,000.00.

The conviction was upheld by the Court of Appeals for the Ninth Circuit which held that the self-incrimination

defense is not available when records are required to be maintained by law, and that there was no right to counsel at pre-indictment motions to compel testimony before a Grand Jury. Appendix, 3.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS HAS DECIDED A POINT EXPRESSLY RESERVED IN FISHER V. UNITED STATES.

Fisher v. United States 425 U.S. 391 (1976) held that compelling a taxpayer to produce personal financial records prepared by his accountant did not compel a testimonial communication on the part of the taxpayer and therefore did not violate his fifth amendment privilege. A question expressly left open is whether compelling an individual to produce

documents he or she had personally prepared or executed is compelling personal authentication or testimony. 425 U.S. at 414.

That question is presented in the instant case. The subpoenaed documents were prepared by petitioner in the course of his laboratory business. The criminal charges were based on his statements in these documents. Compelling him to produce the billings compelled petitioner to produce personal testimony or to authenticate written statements. As thus applied by the court of appeals, the required records doctrine does not comport with the constitutional test announced in Fisher. The privilege against self-incrimination under the fifth amendment was erroneously disregarded in the decision below.

2. THE DECISION BELOW RAISES SIGNIFICANT RECURRING PROBLEMS CONCERNING THE PROPER TEST FOR A CLAIM OF PRIVILEGE UNDER THE FIFTH AMENDMENT.

The decision in Fisher v. United, 425 U.S. 391 (1976) was meant to simplify the determination of claims of the fifth amendment disclosing documents. The welter of doctrines and exceptions following Boyd v. United States, 116 U.S. 616 (1886) was often decried. Both the private papers doctrine of Boyd and the required records exception of Shapiro v. United States, 335 U.S. 1 (1948) were criticized as lacking constitutional basis. Fisher abrogated these various doctrines and exceptions, except insofar as they comported with its holding. Instead, a claim of privilege is to be

submitted to a three part test based on the terms of the amendment: the document must be testimonial and incriminating, and the compulsion must be exerted upon the person holding the privilege during a criminal proceeding.

Nevertheless, the court of appeals relied upon the required records doctrine. Other courts subsequent to Fisher have found it necessary to analyze the claims of privilge in terms of both the private papers and required record doctrines, in addition to the Fisher analysis. e.g. United States v. Plesons 560 F.2d 890 (8th Cir. 1977). The multiple standards are evident throughout the proceedings in this case.

For the benefit of all concerned, the accused such as petitioner , prosecutor and the judicial system, the

court should indicate clearly that the controlling test of Fisher v. United States should be applied to each claim of fifth amendment privilege.

3. THE CRIMINAL PROCEEDINGS IN WHICH PETITIONER WAS COMPELLED TO PRODUCE INCRIMINATING DOCUMENTS ARE INFECTED WITH SERIOUS CONSTITUTIONAL ERROR AND WARRANT THE COURT'S DIRECTIVE TO PREVENT FUNDAMENTAL UNFAIRNESS.

Seven months after the criminal complaint was first filed against him, petitioner ended up entirely alone before the awesome authority of the United States District Court and the power of the United States Attorney's Office, and was ordered to turn over personally incriminating documents with incarceration as the only apparent

alternative. Petitioner was without an attorney, and was not advised that unlike a grand jury proceeding, representation by counsel was permitted and indeed normal in such an adversary criminal law proceeding. Without counsel, he could realistically only submit to the outcome, not knowing of the legal procedures challenging the order. At a minimum, petitioner should have been advised that he could be represented by an attorney when appearing before the court and facing its sanctions, and he should have been allowed sufficient time to obtain one.

The maneuvering by the prosecution, and the resulting prejudice to the petitioner is evident in the sequence of events. Beginning with the criminal complaint and the apparently abortive

search and seizure in January of 1979, there was essentially one criminal proceeding against the petitioner. Soon after dismissing the first complaint, the government brought a subpoena duces tecum for numerous documents prepared by petitioner for his laboratory business. It did not seek to enforce the subpoena until after the death of petitioner's counsel. Petitioner was not informed that unlike a Grand Jury hearing where counsel is not permitted, a motion to compel is one where counsel could and would be expected to argue. The court was apparently unaware that petitioner was a target defendant. Petitioner was given no alternative but turning over the documents or going to jail. In every published opinion concerning the assertion of fifth amendment privilege

for personal documents in grand jury proceedings, the claimant was represented by counsel, and contested the subpoena through motions and appeals. e.g. I.C.C. v. Gould 629 F.2d 847(3rd Cir. 1980); In re Grand Jury Proceedings 601 F.2d 162 (5th Cir. 1979).

Had petitioner had counsel, he could have sought further judicial clarification of his obligations to produce documents, perhaps narrowing the scope of the production and further clarifying and supporting the basis for over his claim of privilege. Instead, the government received all items on the list. Petitioner did not receive any of the warnings reviewed in United States v. Washington 431 U.S.181 (1977). He was confronted with greater pressures than

faced by Grand Jury witnesses. The guarantees of due process under the fifth amendment require at a minimum that petitioner be afforded a warning that he might have counsel if he chose.

4. A SUBSTANTIAL DEPRIVATION OF CONSTITUTIONAL RIGHTS APPEARS IN THE PROCEEDINGS TO COMPEL PETITIONER TO PRODUCE TESTIMONIAL DOCUMENTS FOR THE GRAND JURY.

In recent decisions the court has reversed court of appeals decisions that gave Grand Jury witnesses the full panoply of rights afforded criminal defendants. These opinions have stressed the singular history and role of the Grand Jury as obviating the need for such

protections as the warning of a right to remain silent, United States v. Mandujano 425 U.S. 564 (1976) or advising a witness that he was a potential defendant, United States v. Washington 431 U.S. 181 (1977). Both opinions noted that the prosecutor gave varous warnings to the witness and that these warnings would satisfy any possible due process requirements.

It is not suggested here that the Grand Jury is not entitled to testimony. The problem presented by the petitioner's case is the means by which his claim of privilege was overwhelmed. Mandujano and Washington concern the rights of the witness when testifying before the Grand Jury. A different situation is presented when a witness is brought before a judge by the motion of the prosecutor to compel

his testimony. Such a motion to compel leads to a trial-like confrontation. The authority and sanctions of the court are invoked, and incarceration is possible. In such a setting, the witness or the accused should be granted further warnings and protection, since the confrontation with governmental power is greater than is found in the Grand Jury room. The decisions below, however, seem to have assumed that there was no distinction.

Rather than the warnings being deemed more-than-sufficient in Mandujano and Washington, the record does not show any. The unfettered exercise of Grand Jury investigative powers should not be applied to ancillary judicial proceedings. When brought before the

court, the Grand Jury witness is confronted with the loss of what he claims is privileged testimony, or alternatively the loss of his liberty. A greater sensitivity to due process than that exhibited in the orders and opinions below is warranted.

In petitioner's case, there is an added element of the continuing nature of the prosecution from initial (though later dismissed) criminal complaint through the Grand Jury proceedings. This strongly suggests that the right to counsel under Kirby v. Illinois 406 U.S. 628 (1972) should be applied. Even absent that element, the nature of the proceedings requires warning to those subject to the court's powers that they may have the advice of counsel.

The court's opinions in Mandujano and Washington are being applied beyond the proper context. Fundamental fairness expected of our judicial proceedings is not apparent and is not promoted by proceedings below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Counsel for Petitioner

Date: April 13, 1981

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

To: Custodian of Records
Profession Group Laboratory
Professional Group Laboratory X-Ray
4138 Atlantic Avenue
Long Beach, CA

You are hereby commanded to appear in the United States District Court for the Central District of California at 312 N. Spring Street in the City of Los Angeles on the 30th day of April, 1979 at 9:30 o'clock A.M. to testify before the Grand Jury and bring with you:

-SEE ATTACHED RIDER-

THESE RECORDS MAY BE TURNED OVER VOLUNTARILY TO AN AGENT OF THE FBI PRIOR TO THE ABOVE GRAND JURY DATE IF YOU DO NOT DESIRE TO BE PRESENT AT THE GRAND JURY.

This subpoena is issued on application of the Unites States of America.

ANDREA SHERIDAN ORDIN,
U.S. ATTORNEY
ROBERT RAMSEY, JR.,
ASSIST. U.S. ATTORNEY

/s/ EDWARD M. KRITZMAN clerk
by /s/ ANNE BEIHOIST D.C.

RIDER

1. Identity of all reference laboratory or laboratory(ies) doing reference work for PGL from 1/1/78 to 12/31/78.

2. Listing of work performed for PGL by those reference laboratory(ies) from 1/1/78 to 12/31/78 to include the following:

    a. Identity (name, medicare or medi/cal #, SSAN #, etc.) of person for which laboratory test pertained.

    b. Specific test(s) performed.

    c. Fee charged PGL by reference laboratory for test(s) performed.

3. Photocopy of all billings submitted to PGL from 1/1/78 to 12/31/78 by reference laboratory(ies).

4. Photocopy of all billings from 1/1/78 to 12/31/78 submitted to Medicare, Medi/Cal, private patients and private patient insurance intermediary which contain laboratory test(s) performed by reference laboratory(ies).

5. Photocopy of all billings relating to x-ray exams submitted by PGL to Medicare, Medi Cal, private patient and private patient insurance intermediary from 11/1/78 to present.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. CHARLES DUARTE, Defendant.	CR 79-973-WMB RULING RE MOTION TO SUPPRESS

On January 9, 1979, defendant was arrested on a complaint for violation of Section 1395nn(b)(2) of Title 42, U.S.C. He was arraigned and released on his own recognizance. On January 11, 1979, his place of business was searched by Federal agents. Subsequently, the complaint was dismissed. There is no evidence that the governmnt dismissed the original complaint with the intention of later

seeking an indictment.

On April 11, 1979, defendant was served with a Grand Jury subpoena requiring the production of, among other things, claim forms submitted to Medi-Cal. The subpoena was addressed to the custodian of records of Professional Group Laboratory. The defendant was said custodian. The Professional Group Labotatory was an individual proprietorship solely owned by defendant.

In May of 1979, W. R. Rainbolt, defendant's then attorney, advised the United States Attorney's office that his client would refuse to produce the documents subpoenaed and would assert his constitutional privilege against self-incrimination. On July 18, 1979, defendant appeared before the Federal Grand Jury, and when ordered to produce

the documents, claimed a privilege against self-incrimination.

A motion to compel production of documents was filed and heard before Judge Harry Pregerson on September 19, 1979. The defendant appeared and was not represented by counsel. He advised the court that his attorney, Mr. Rainbolt, had died two months before. Defendant did not express any desire to be represented by any attorney or to have an attorney appointed. The court did not inquire of defendant whether he wanted to be represented nor suggest to him that he may have the right to counsel. Judge Pregerson then found that:

"THE COURT: . . . .

The government's motion for an order compelling Charles Duarte, as custodian of records for Professional Group Laboratories, or Professional Group X-Ray, or his duly authorized representative to produce forthwith certain documents before the Federal Grand Jury is granted."

Defendant subsequently turned over the subpoenaed documents. On December 4, 1979, defendant was indicted by the Grand Jury. The subpoenaed documents relate only to Counts 1 through 20 of the 21 Count indictment. Count 21 was identical to the charge set forth in the complaint which resulted in his arrest in January, 1979.

Defendant now moves to suppress the subpoenaed documents on the basis that the government obtained them in violation of his rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution. More specifically, defendant urges that his privilege against self-incrimination was violated and that he had a right to have counsel represent him at the hearing before Judge Pregerson on the government's motion to compel production of documents.

This Court finds that the required production of documents by Mr. Duarte, as custodian of the records of the Professional Group Laboratory, did not violate his Fifth Amendment rights because the subpoenaed records were legally required to be kept and fall within the "required records"

exception to the Fifth Amendment privilege against self-incrimination as set forth in Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709 (1968). See Sreter v. Hynes, 419 F. Supp. 546 (E.D.N.Y. 1976); 42 U.S.C. Sections 1320(c), 1396(a)(27); 42 C.F.R. Section 405.406(d) (1979).

The Court further finds the defendant did not have a constitutional right to be represented by counsel in opposing the government's motion to compel at the hearing before Judge Pregerson, inasmuch as no adversary judicial proceedings had been initiated against him. Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877 (1972); Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932).

The defendant's motion to suppress is denied.

DATED: January 30, 1980

/s/ Wm. Matthew Byrne, Jr.

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	No. 80-1185
Plaintiff-Appellee,	DC #CR
v.	79-973-WMB
CHARLES DUARTE,	MEMORANDUM
Defendant-Appellant.	

Appeal from the United States District Court fot the Central District of California

Wm. Matthew Byrne, Jr., District Judge, Presiding

Submitted November 17, 1980

Before: WRIGHT, CHOY and FERGUSON, Circuit Judges

The defendant was convicted of Medi-Cal fraud. He contends that it was error to compel him as the custodian of laboratory records to produce them before a grand jury.

In United States v. Rosenberg, 515 F.2d 190 (9th Cir. 1975), we held that the self-incrimination defense is not available when records are required to be maintained by law.

The defendant also argues that he should have been advised of his right of counsel at the time of the hearing on the government's motion to compel production of the subpoenaed documents. Miranda does not apply as he was not in custody; and as no criminal proceedings had been instituted against the defendant at that time, the Sixth Amendment right to

counsel had not come into play. United States v. Mandujano, 425 U.S. 654 (1976).

AFFIRMED.